

*James Hunter  
Lord of Kinnaird*

Feb. 2d, 1761.

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[To be reported by Lord Alemoor.]

*Alemoor*  
**INFORMATION**

**FOR**

**James Hunter tenant in Inchtore, De-  
fender,**

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**AGAINST**

**Charles Lord Kinnaird, Pursuer.**

**I**T is a fact well known in Perthshire, that the defender was one of the first improvers of the Carse of Gowrie, by draining, planting, inclosing, and other approved methods of agriculture. The estate belonging to the family of Kinnaird, had been for a course of years in very great disorder, particularly about 1730, and downwards, when the deceased Mr. George Kinnaird, father to the present Lord, was tackf-  
man of the estate, under the late Charles Lord Kinnaird, who then stood burdened with a load of debts, which, notwithstanding the entail, he was obliged to pay. Moreover,

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improvement of land in that part, was, at that time, little known or attended to, and the Lands of this estate more especially were in a very bad condition, and set in a sort of mixt or run-rig way, to a parcel of poor tenants, who had no more in view than the earning a scanty subsistence from their possessions.

When matters were so situated, the defender, whose skill and industry will not be disputed, resolved to engage, at the hazard of his stock, in the improving of part of this estate.

18th Nov. Accordingly, of this date, a tack was entered into between  
1730. the said Mr. George Kinnaird, with consent of Charles then Lord Kinnaird, of the one part, and the defender of the other, whereby the said George Kinnaird set to the Defender, his heirs and assignies, two rooms of land in the barony of Inchtute, formerly possessed by Francis Jackson and Andrew Just, and that for the space of *nineteen* years, commencing at Michaelmas immediately preceeding. On the other hand, the defender became bound to pay a yearly rent, consisting of 32 bolls of wheat, 42 bolls bear, and 42 bolls meal, together with some kain fowls, &c. being precisely the same rent which the two preceeding tenants had paid.

The defender immediately set about improving this farm at a considerable charge, and thereby gave great satisfaction both to his master and the whole neighbourhood; but as the endurance of his lease was too short for his reaping the just profit of his labours, the said Charles Lord Kinnaird, from a sense thereof, voluntarily agreed to prorogate the same for the space of *twenty five* years after its original termination.

9th Oct. Accordingly, his Lordship, of this date, entered with the  
1738. defender into a new contract, whereby, after a recital of the former tack, and subsuming " that the said James Hunter " has been at great expence, trouble, and labour in meliorating the foresaid lands; in consideration thereof, and for " a further encouragement to him to go on in meliorating " the said lands," the said Charles Lord Kinnaird prorogated



ed to the defender, his heirs or assignies, the foresaid tack of the said lands, and also set the same of new, for the said space of *twenty five* years from and after the ish thereof. His Lordship thereby likewise empowered the defender to plant trees, and cut down the same for his own uses, &c. The defender, on his part, became bound to pay the same rent during this new lease and prorogation, as was stipulated in the original tack.

The defender still found his possession and improvements greatly incommoded by a room then possessed by Patrick Mitchel. Mitchel's land was almost surrounded by the defender's, and they were likewise so intersected by each other on their marches, that the defender could not possibly get proper ditches made for draining his grounds, without an excambion of several parts of both farms. This Mitchel never would agree to, and his obstinacy in other respects occasioned frequent disputes between him and the defender, who, moreover, had little better to expect in such a situation from any other country tenant, that might come there. It happened however, that Mitchel's tack expired in the 1754, and the tack of his possession for the space of *thirty eight years* after seperation of the crop from the ground in 1755, was exposed to public roup. By the articles <sup>21st Oct.</sup> which are in process, it was provided, that the rent should be <sup>1754.</sup> the same, that Mitchel had paid, but that the person who should offer the highest sum by way of grassum, should be preferred to the lease. Several bidders appeared who subscribed their offers, and raised the grassum from 30 to one hundred guineas, which was offered by the defender, and he thereupon preferred to the tack as highest bidder. In pursuance of this roup, a tack of the <sup>30th Oct.</sup> said possession was entered into between the said Charles Lord Kin-<sup>1754.</sup> naird and the defender, for the said space of *thirty eight* years, at the rent of 11 bolls wheat, 32 bolls barley, and 32 bolls oat meal, besides some poultry, being the same Mitchel had paid. This tack was also granted to the defender, his heirs, or assignies, and contains the same powers as to planting trees, &c.

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The defender's farm was thus rendered compleat and commodious for inclosing and improving. But when he was about to execute the plans he had formed, whereby it was absolutely necessary, that part of the lands in both his tacks should be thrown together in the same fields or inclosures, and the drains or ditches, which formerly divided them in some parts be run streight, an evident risk and inconveniency appeared from the expiry of the tack, or prorogation of his first lease and possession, 19 years before the ish of the other tack he had purchased at the roup. It was plain, that should his right to the one possession fall before the other, and occasion a separation, disputes would arise respecting the antient marches of the two farms, and likewise many of his best fields would be thrown open and disfigured. He also found it necessary to have new barns and office-houses built, and a new barn yard made, convenient for both possessions, which would be done at a great charge, and could not serve both farms when divided. For these solid reasons, he applied to the late Lord Kinnaird, who, from a just sense thereof, agreed upon payment of a grassum of 50 guineas, to prorogate the tack of his first possession to the same endurance with the tack of his other possession purchased at the roup.

7th Nov.  
1757.

Accordingly, of this date, Lord Kinnaird entered with the defender into a prorogation, of the current tack of the defender's the first possession, reciting the same and former tacks thereof, and also tack of the other farm, and subsuming in these words, ' And ' seeing that the foresaid lands posselt by the foresaid James ' Hunter, and those now likewise posseld by him, and former- ' ly by the said Patrick Mitchel, lay so interwoven with one a- ' nother, that there was no laying out the most part of them in ' proper fields, or ditching, or draining the same, and thereby ' the improvement of the lands was impeded; on which account ' it was that the said James Hunter entered into the tack of the ' said lands possessed by the said Patrick Mitchel; therefore, ' and as an encouragement to the said James Hunter to ditch ' and drain the said lands, and lay them out in proper fields, ' and



‘and otherwise improve the same, and that he and his forefaids, their possession of the whole may be of equal endurance, thereby to prevent disputes that might arise at the ish of the forefaid tack, or prorogation, when the marches of the different possessions could not perhaps be well distinguished; the said Charles Lord Kinnaird hath, &c.’ For these causes, his Lordship thereby *prorogated* the aforefaid tack of date the 9<sup>th</sup> of October 1738, for the space of *nineteen years*, from and after the ish of the same, in favours of the defender, his heirs or assignies; and also of new, set the said room, or farm, to the defender, or his forefaids, for the said space, after the same period. On the other hand, the defender thereby became bound to pay the same rent as formerly during the currency of the prorogation.

The defender having obtained this last prorogation, did, on the faith thereof, as well as his other tacks, pull down the old barns and office-houses, particularly those on Mitchel’s farm, which were good for nothing, and built on his own charges new barns, with lofts above them for holding the grain, and other office-houses and barn-yard, suitable to his whole possession. He also made proper drains and inclosures, planted trees, and otherways greatly improved both his farms which being now thrown together, and having only one set of barns and offices, cannot be separated without manifest difficulty, and prejudice to the possessions and improvements made upon them, and to the infinite loss of the defender, who has laid out above 900 *l.* Sterling upon them.

Your Lordships will observe, that the original tack, which the defender obtained in the 1730, of his first possession, for 19 years, expired at Michaelmas 1749. The prorogation of that tack, obtained in the 1738, for twenty five years, commenced in the 1749, and will run out in the 1774, and the last prorogation, of the tack of that possession, for nineteen years, to commence in the said year 1774, will expire in the 1793. This exactly corresponds with the defender’s tack of the other farm

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for 38 years from the 1755, which runs out in the same year 1793.

The late Charles Lord Kinnaird, granter of the said tacks, died in July 1758, when, your Lordships the fee defender was in possession of his first farm, on the first prorogation, or second tack thereof, which commenced in the 1749, and of his other farm upon the only tack he ever had of it, which commenced in 1755, so that there were then *thirty five* years to run of this last mentioned tack, and sixteen of the current tack of the first farm, besides the 19 years of the prorogation of it.

The said Charles Lord Kinnaird was succeeded in his titles and estate by his cousin Charles, now Lord Kinnaird the pursuer, who, while in the state of expectancy, received many favours from the defender, and seemed so sensible of them as to give him no room to expect any treatment unfavourable from him.

However, the improvements the defender had made on his possession, which indeed attracted the observation of the neighbourhood, have also had the unhappy effect of making his Lordship desirous to reap the profits of them. Hence, immediately on his succession, he raised a process of reduction of the foresaid tacks on these grounds; *1mo*, ' That the  
' same were granted by the late Lord, a weak and facile man,  
' contrary to the prohibitions in the tailzie of the estate of  
' Kinnaird, in virtue whereof, the said late Lord had right  
' to the estate, and by which the heirs of tailzie are prohibited from doing any deed whatever, by which the estate  
' may be affected. And, *2do*, That the same are granted for  
' a much longer term of endurance, than an heir of tailzie  
' can lawfully grant, as otherwise, such an heir in possession  
' might make the succession to a succeeding heir of small consideration; and particularly, as to the tack (or prorogation)  
' obtained in 1757, a short time before the granter's death, no  
' possession having been had thereon, but the commencement  
' there-

‘ thereof being after the granter’s death, the same cannot  
 ‘ prejudice the pursuer.’

These reasons of reduction came to be discussed before the Lord Bankton Ordinary, who took the debate to report; and now, upon a remit, the cause is to be reported by Lord Ale-moor; in order thereto, this information is humbly offered on the part of the defender.

In the entry, the defender holds it as admitted by the pursuer, that independent of the entail, the whole tacks in question are unchallengeable. They are fair and lawful contracts, whereof the provisions were purchased by the defender, for an adequate onerous cause and stipulation. Any unjust reflections on the capacity of the late Lord, might well have been spared, not only in respect, that by his Lordship’s administration in paying off a vast load of debt, this pursuer now succeeds him in a noble fortune, but as the late Lord’s transactions with the defenders, will, it is hoped, appear to your Lordships most rational and just. The sole ground of exception, therefore, is the entail of the estate, which can at no rate afford a favourable plea to the pursuer.

Tacks set at an adequate rent, more especially when cloathed with possession, have all the force that any debts or contractions whatever can have. They are moreover *real* rights, and as such, by express statute, made good even against singular successors. Hence it falls first to be enquired, Whether this entail is such, as renders the estate unassailable by the debts, or onerous deeds of the heir in possession? *2dly*, Whether, supposing it sufficient against common creditors, if yet it can be ground for reducing the tacks in question?

As to the first point, it appears, that in the 1678, Sir George Kinnaird executed a bond of tailzie, and procuratory of resignation of the whole estate of Kinnaird, in favours of himself in liferent, and Sir Patrick Kinnaird, his eldest son, and the other heirs of entail therein mentioned. This entail never was recorded, but upon the procuratory of resignation, a charter under

18th April,  
1678.



der the great seal was expedie by the said Sir George Kinnaird,  
 21st August, 1679. the tailzier, in the 1679. This charter recites the bond of tail-  
 zie, which the defender had never access to see; but he has  
 procured a copy of the charter. The only title produced by  
 the pursuer, is his special retour as heir of tailzie to the late  
 Charles Lord Kinnaird, and his seafine thereon, containing the  
 limitations of the original entail.

27th Feb. 1694. This charter 1679 was registred in the register of tailzies, in  
 the 1694; and, *inter alia*, it contains the following limitati-  
 on: That it shall not be lawful to the heirs succeeding by vir-  
 tue thereof, 'to innovate or infringe the foresaid tailzie, nor to  
 'sell, alienate, dispone, or dilapidate the foresaid lands and e-  
 'state, or any part or portion thereof, nor to contract debts,  
 'or sums of money thereupon, nor to do any other deed by  
 'which the foresaid lands or estate, or any part thereof, may  
 'in any manner happen to be apprised, adjudged or evicted by  
 'others, in prejudice and defraud of the subsequent heirs male  
 'and tailzie foresaid.' Which hail debts and deeds are there-  
 by declared void, and the right of the contraveener irritated;  
 but there is no mention whatever made of tacks in this charter  
 or entail.

Your Lordships will here observe, that both the original  
 tailzie and charter, were of date prior to the act 1685; from  
 whence it will perhaps be said by the pursuer, that the same  
 are good against creditors, without registration; and further,  
 that the tailzie was at any rate compleated by the registration of  
 the charter in the 1694.

The defender, however, does humbly apprehend, that the  
 circumstance of the entail's being prior to the act 1685, cannot  
 support it against creditors, if not registred in terms of that act,  
 altho' the limitations of it stand inserted in the several subse-  
 quent retours and investitures. The intention of that act  
 was not only to give full force to such entails, the validity  
 of which had been formerly doubtful, but also to give pro-  
 per opportunity to creditors, and all others contracting, to  
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see the tenor of such entails, and the precise limitations under which the estates were held. To answer this last salutary purpose, it is absolutely requisite that tailzies, of whatever date, should appear in this particular register, where the lieges may have access to inspect them, without canvassing long progresses, or searching after charters and infeftments. The defender, however, will not trouble your Lordships with enlarging on this point, as he looks upon it to be fixt and determin'd, both by the judgment of the House of Peers, 1730, in the case of Borthwick of Crookstoun, and most solemnly by your Lordships decision, in the very recent case of the estate of Rothies, now affirmed in the last resort.

Again, with respect to the recording the charter 1679, in the register of tailzies, it appears to the defender to be altogether erroneous and insufficient. The act 1685 declares, ' That such tailzies only shall be allowed, in which the fore-  
' said irritant and resolute clauses are insert in the procu-  
' ratories of resignation, charters, precepts, and instruments  
' of seafine, and the *original tailzie* once produced before the  
' Lords of session judicially, who are hereby ordained to in-  
' terpose their authority thereto; and that a record be made  
' in a particular register-book, to be kept for that effect,  
' wherein shall be recorded the names of the maker of the  
' tailzie, and of the heirs of tailzie, and the general designation  
' of the lordship and baronies, and the provisions and condi-  
' tions contained in the tailzie, with the foresaid irritant  
' and resolute clauses subjoined thereto, to remain in the  
' register, *ad perpetuam rei memoriam.*' Here it is expressly enacted, that the *original tailzie* shall be judicially produced and authorised by your Lordships, which was not done in this case. How the charter came to be registred, the defender cannot account, but to him it appears equally insignificant, as if the seafin upon it had been so registred. The act indeed does not say, that a full copy of the tailzie shall be inserted in the register, tho' it is believed such has been the practice; but the statute is exprefs, that nothing else but  
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the *original* deed of entail shall be judicially produced, and authorised or allowed previous to such registration: And indeed, charters, as well as *feasines*, being but the assertion of third parties, that such original deeds did exist, cannot reasonably be sustained as sufficient to supply the non-production of them; nor is it at all probable, that a party would get the original entail allowed, and then register the charter proceeding upon it, there being no evidence therefore, that this *original* tailzie ever was produced and allowed in terms of the act, it cannot, it is apprehended, have the benefit of the statute.

Tailzies being justly unfavourable in law, the smallest deviation from the forms requisite to make them effectual is allowed to set them aside in questions with creditors: It appears that those very defects under which this tailzie labours were thought by the lawyers and friends of the family of Kinnaird sufficient to void it. In the 1725, the question was brought to a hearing in this court, between the late Charles Lord Kinnaird (the granter of the tacks) and the creditors of his predecessors. Minutes of debate were made up, but the decision prevented, by Lord Kinnaird's yielding the point to the creditors, and setting apart a large portion of the estate for their payment, out of which they were accordingly, in a course of years, all paid off.

The defender, from the premises, concludes, that this entail is not effectual against the lawful onerous creditors of the heir in possession; and if he is right in this point, there seems to be an end of the present question, as by the tacks challenged, purchased for onerous and adequate considerations, he stands at least on an equal footing with any of the late Lord's creditors.

But, in the *second* place, supposing this entail to be in every respect legally compleated, agreeable to the act 1685, yet the defender does humbly maintain, that it is not sufficient to reduce his tacks.

It is now a well established rule, already hinted at, that entails being an irrational and unpolitic restraint upon property,



erty, are in every case to receive the strictest interpretation, so as not to be extended by implication, or supported beyond their plain and positive tenor. Hence, a tailzie prohibiting the heirs to alter the succession, without mentioning the contracting of debts, will not save the estate from such debts; or a tailzie prohibiting the contraction of debt, without mention of selling, will not debar the right of an onerous purchaser. In this tailzie indeed, both sales, alienations and contractions, are prohibited under the usual irritancies, but still no limitations whatever are laid on the heirs, as to the granting tacks or leases. Nor can this omission be reasonably supplied, were extension by implication allowed, because it is well known to your Lordships, that special provisions in tailzies have been usual, restraining the heirs to grant leases beyond a definite space of time, or under the former rent. The omission of such limitation here cannot therefore be imputed to oversight, but must be considered as expressive of the tailzier's will, that the heirs should be left at liberty to grant tacks for such length of time, and at such rent as they should think proper.

An heir of tailzie in possession, tho' in some sense held to be only what the English call a tenant in tail, yet is with us considered as a proprietor of the estate, where his hands are not tied up, and as such may do every reasonable act of property that any other proprietor can do. The setting of tacks for a reasonable rent and endurance, is certainly one of those acts most essential to the exercise of property; it is conducive to the police of the country, and to the particular improvement of the tailzied estate. The succeeding heirs, therefore, can never pretend, that they are hurt by such tacks, as it would have been reasonable for their predecessors to have given, had he possessed an unentailed estate.

To apply these observations to the tacks under challenge, your Lordships have already heard the respective causes of granting them, their tenor, and the manner in which they

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were obtained ; two of them were current, and cloathed with possession in the lifetime of the granter ; and the third is a prorogation of a lease not yet expired.

As to the first two, it is believed the pursuer has no hopes of prevailing, in setting them aside : One of them, your Lordships see, was originally granted only for *twenty-five* years, whereof no more were to run at the death of the granter than *sixteen* ; and therefore the defender would be ashamed to trouble your Lordships with further argument in its support. The other was originally granted for *thirty-eight* years, but there were only *thirty-five* to run at the late Lord's death in the 1758. The defender cannot imagine your Lordships will consider this endurance as unreasonable, or beyond what an heir of entail, not expressly prohibited, might rationally and legally grant. Your Lordships too will consider, that both these tacks were set at the same rent the former possessors gave ; that the defender had been at great charge in improvements ; that thereby two incommodious possessions were thrown together for the better prosecuting those improvements, that any rise in their value has been produced by the defender's own industry and expence ; and that he purchased the longest tack, by being the highest bidder at a public roup. It will not be denied, that long tacks are the readiest means to promote the improvement of any estate, as no man will bestow his pains and labour, without security, that he or his heirs shall reap the fruits of it. Hence your Lordships have sustained tacks for many hundred years against the heirs of the granter, and for much more than twice nineteen years, even against onerous purchasers.

It has been in some cases objected to long tacks, that they are subversive of the feudal law, and dangerous to purchasers, as amounting to a perpetuity, and not appearing upon record : No such thing, however, can be here pretended ; the life of man is presumed to be one hundred years, and nothing within that space can possibly be called a perpetuity, much less can

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*thirty-eight*, years a term which even the present tacksmen may possibly see expire. At any rate, no heir of entail, whose tailzie mentions nothing of tacks, can be in a better situation than a singular successor, or purchaser of the lands would be. Supposing then the late Lord had sold the estate to the pursuer, and that the pursuer was ignorant of these tacks at the time of the sale, yet it could not bear a dispute, that even the longest of the tacks being made real by possession before such sale, would have been good and effectual against him. The defender, therefore, cannot entertain the smallest doubt of your Lordships sustaining both these tacks as just, onerous, and rational contracts, and also as compleat and effectual real rights.

Again, with respect to the prorogation, granted by the late Lord Kinnaird, in the 1757, whereby he prorogated the current tack of the defender's first possession for *nineteen* years, so as to make the ish of it the same with that of his tack of the other possession, there can be no doubt, that if the defender's exceptions above stated, to the validity of the entail, are good, this prorogation must be effectual against the pursuer, as the heir of the granter.

But further, supposing the entail compleat and effectual, so far as the prohibitions of it extend, yet, in the defender's apprehension, it does not give the pursuer any sufficient ground to challenge this prorogation. The estate is not thereby affected *in prejudice* and *defraud* of the pursuer, seeing no deed can be considered, as having that effect, unless it is either expressly prohibited as such, or is in itself inconsistent with rational administration. That this deed is not expressly prohibited, must be admitted, and that it was highly reasonable and just for the late Lord to grant it, your Lordships see, from the account already given of it, the substance whereof is expressed in the deed itself. The apparent advantage arising to the proprietor, by uniting the defender's two possessions, the great expence the defender had already laid out in improving them, as thrown together, the en-

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couragement requisite for future improvements, and the evident disadvantage to the defender, and even to the estate, should they be again disjoined at an early period, made it equitable and proper in every sense, for Lord Kinnaird to prorogate the one tack to the length of the other. Add to this, that the defender did, in the 1757, pay a grassum of 50 guineas for this prorogation, to commence in the 1774, which is near equal to 100 guineas, paid at that commencement, and that on the faith thereof, he has built one entire set of new offices for the whole farm, at his own charge, and laid out other expences upon it, amounting to many hundred pounds Sterling. All these considerations make this prorogation highly onerous, as well as reasonable; and altho' the rent has continued the same, yet the pursuer has thereby no cause of complaint, seeing any increase of the value since the defender's entry, has been entirely produced by his own industry, and will be far from repaying him his charges, should he be deprived of the benefit of this prorogation.

Holding then this deed as a reasonable and onerous act of administration, the defender submits it to your Lordships in point of law, whither the pursuer, as served heir to the granter, is not thereby bound. It is true, he is served heir of tailzie, which if good, will protect him against deeds and contractions of his predecessor, inconsistent with the express limitations thereof; but still, in so far as his predecessors acts and deeds were not prohibited, and at the same time are in themselves rational and just, he falls to be considered as representing his predecessor, and bound like other heirs to support those deeds.

The pursuer lays his chief objection to the prorogation on this circumstance, that the commencement of it not being come at the granter's death, the same falls to be considered as a mere personal obligation, and so not good against the pursuer, who is not liable for his predecessor's personal contractions.

In answer to this objection, the defender repeats what he has argued above, respecting the validity of the entail, it's not  
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prohibiting such deeds, and the rationality and onerosity of the one in question. Your Lordships will likewise be pleased to consider, that the late Lord might have taken up the defender's current tack, and granted a new one for the remaining years of it, and the years of this prorogation; such new tack would have been compleated by possession, and been effectual for the reasons already given in support of the other tack. Now, if the late Lord might have given one entire new tack for the years intended, it is submitted, if his successor is not barred from objecting to the execution of his intention, in the way followed of a prorogation.

Again, the defender does humbly contend, that the prorogation of a current tack is not to be considered as a new distinct tack, but as truly a part of the tack prorogated, and that therefore possession is from its date to be understood as held on both jointly. This is supported by the very tenor of the prorogation which here bears express reference to the current tack, and prorogates the endurance of it for the term therein mentioned. It is therefore in the strictest sense a part of the current tack, and was clearly understood to be such by the parties at the time, otherwise the current tack would have been discharged, and a new one granted for the whole time. Whatever then might be the case of a quite new tack, bearing its commencement at the ish of the current one, but not referring to it, such cannot be decisive of the present question, which relates to the validity of one and the same tack, consisting of two parts. The defender sees no reason why a tack may not be executed by different deeds or writs, or why a subsequent deed between the same parties may not be executed for explaining, adding to, or amending the former, so as to make altogether one entire contract; nor is it any objection to this, that purchasers may be endangered by a latent deed, for the current tack, or first part, is no more on record, or by law required to be so, than the prorogation, and a purchaser or an heir

heir may call on the tenants for production of the one as well as of the other.

The defender therefore does humbly maintain, that the prorogation as well as the tack prorogated, was compleated and rendered real by possession in the life-time of the granter, that thereby the same would have been good against a purchaser, and, *a fortiori* must be so against this pursuer. He can in no shape be considered to have a stronger right to challenge the same, than a purchaser would have had, against whom, after infestment, no personal deed of the seller is good; and your Lordships have made a wide distinction between the case of purchasers and heirs, in questions respecting tacks of a very long endurance, as particularly in the late case of *Belladrum contra his Majesty's advocate*.

Now, that your Lordships have sustain'd such prorogations as good, even against singular successors, in cases less favourable than the present, appears from sundry decisions. Thus it was found, that tenants having tacks for terms to run, and other tacks, the entry whereof to be at the ish of the first, may defend themselves thereby, altho' the setter should sell the lands before the entry of the last tack, 7th March 1704, *Preston contra tenants of Dudingston*, observed by Lord Haddington. Again, a tack was sustain'd against a singular successor, altho' it was not to commence for two years after the said singular successor's right, because the tacksmen was in possession by virtue of a prior tack, and the new one to commence at its out-running, both which were lawfully sett *ab initio*, *Durie*, 20th July 1622, *Mackcarro*. In neither of these cases does it appear, that the second tack had any express reference to the first, and consequently the tenant's plea was much narrower than the defender's.

The defender shall only trouble your Lordships with one other recent decision observed by Mr. *Edgar*, and also noticed in the *Dictionary*, which, it is hoped, will entirely satisfy your Lordships on this point. It is the case of *William Richard contra*  
 Doctor



Doct<sup>r</sup> *William Lindsay*, 7th January 1725. Pittullo of Balhousie in 1705, set a tack of certain lands to George Richard the pursuer's father for 19 years. In the 1720, he granted him another tack of the same lands for other 19 years, to commence at Martinmas 1724, which was the ish of the former, and in this last tack, there was no reference to the first, and the rent was also raised. In the 1721, *Balhousie* sold the lands to Doct<sup>r</sup> *Lindsay*, and *Richard* thereupon brought an action of declarator against the Doct<sup>r</sup>, concluding, that the last tack, entered into during the currency of the former, should be declared good against the defender notwithstanding the sale. It was argued for the pursuer, that by the act of parliament 1449, tacks are declared real burdens on the land, and effectual against singular successors; and that this last tack was nothing else than a prorogation of the first, appeared from its being to commence precisely when the former expired. The defender answered, that only such tacks were real and effectual against singular successors, upon which the tenant was in possession of the lands, and that this last tack could not be thought a prorogation of the former, as it had no reference to it, and the tack-duty was different, and that if such new and latent tacks should be sustained against purchasers, they never would be certain of attaining the possession of their purchases. There were other points argued, and some of them separately sustained relevant to support the tack; but your Lordships interlocutor was special as to each; and upon this particular point, *sustained the declarator as to the second tack, and found the same imported a prorogation of the first tack to defend against a singular successor.*

This last decision apparently proceeded on narrower grounds than the present defender's plea, where the question is not as to the validity of a new tack, but of a clear and express prorogation of a former tack, current in the granter's time. If such new tack was repeatedly sustained against a singular successor, *a fortiori*, must this prorogation be supported against the pursuer. And your Lordships will observe, that both in

the argument, and in the interlocutor, in *Richard's* case, it is admitted, that an express prorogation is as good as the tack prorogated, and held from its date to be equally compleated by possession, *Richard's* tack being sustained purely as an implied prorogation.

Upon the whole, the defender humbly hopes your Lordships will not see any sufficient grounds, either in law or equity for enabling the pursuer to deprive him of the fruits of his honest industry, by reducing the rational, onerous, and *real* rights, granted to the defender by the pursuer's immediate predecessor; and that therefore, your Lordships will sustain the tacks in question, and assoilzie the defender from this process.

*In respect whereof, &c.*



DAV. RAE.